

Message

From: Chin, Lucita [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EA404E3F56574242AEE0811A07E309FC-CHIN, LUCITA]
Sent: 5/6/2020 4:28:03 PM
To: Denawa, Mai [Denawa.Mai@epa.gov]; Matsumoto, Kimi [Matsumoto.Kimi@epa.gov]; Perkins, Erin [Perkins.Erin@epa.gov]
CC: Robinson, Valois [Robinson.Valois@epa.gov]
Subject: FW: NHPA and R9 permit RE: Monthly SDWA legal issues call

Ex. 5 AC/DP

Lucita Chin
Senior Assistant Regional Counsel | Office of Regional Counsel | Media Law Counseling Section
Environmental Protection Agency Region 8 | 1595 Wynkoop St. | Mail Code: 8ORC-LC-M | Denver, CO 80202
Office: (303) 312-7832

From: Chin, Lucita
Sent: Thursday, May 23, 2019 12:17 PM
To: Darman, Leslie <Darman.Leslie@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Rivera, Nina <Rivera.Nina@epa.gov>
Subject: RE: NHPA and R9 permit RE: Monthly SDWA legal issues call

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Lucita Chin
Senior Assistant Regional Counsel | Office of Regional Counsel | Media Law Counseling Section
Environmental Protection Agency Region 8 | 1595 Wynkoop St. | Mail Code: 8ORC-M | Denver, CO 80202
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From: Darman, Leslie
Sent: Thursday, May 23, 2019 11:28 AM
To: Wehling, Carrie <Wehling.Carrie@epa.gov>; Rivera, Nina <Rivera.Nina@epa.gov>
Cc: Chin, Lucita <Chin.Lucita@epa.gov>
Subject: NHPA and R9 permit RE: Monthly SDWA legal issues call

Ex. 5 AC/DP

Excelsior UIC Permit appeal

BACKGROUND

- In June 2018, EPA Region 9 issued a Class III UIC area permit and aquifer exemption for Excelsior Mining Arizona's Gunnison Copper Project.
- The 23-year project involves approximately 1,400 Class III injection wells and recovery wells and encompasses an area of approximately 524 acres, including a wellfield area of approximately 192 acres.
- In July 2018, the Western Mining Action Project petitioned the EAB for review of the permit on behalf of Dagoon Conservation Alliance, Arizona Mining Reform Coalition, Grand Canyon Chapter of the Sierra Club, Center for Biological Diversity, and Patagonia Area Resource Alliance.
- The Petition raises three claims regarding EPA's permitting process:
 - (1) Failure to demonstrate compliance with the National Historic Preservation Act (NHPA) and implementing regulations;
 - (2) Failure to demonstrate compliance with the cumulative effects analysis required in EPA's UIC regulations (40 CFR § 144.33(c)(3)) and the "functional equivalence" doctrine developed by courts in NEPA cases.
 - (3) Failure to demonstrate compliance with UIC regulations related to containment of the mining fluid within the exempted aquifer and protect underground sources of drinking water (40 CFR §§ 144.12, 146.33(a), and 146.6(a)(ii)).
- The applicant and Petitioners are currently in settlement negotiations, and have a draft settlement agreement under review.

NHPA CLAIM

- Petitioners claim that EPA failed to comply with the NHPA and implementing regulations because EPA failed to “demonstrate that it conducted any attempts to communicate with, let alone meaningfully consult, Native American Tribes with historic and cultural ties to the area.”
- Petitioners argue that EPA’s response to their comments on this issue was inadequate because it relied on the current location of Indian Reservation lands, which “is not dispositive of historic cultural use of lands and presence of cultural resources.” (Petition at 24.)
- Petitioners point out that “several Apache tribes are well-known to have inhabited and used the areas surrounding the proposed Project” and that the “NHPA requires federal agencies to affirmatively contact Tribes” when issuing a UIC permit that disturbs surface lands and may affect Native American cultural sites. (Petition at 25).
- EPA’s Record of its compliance with NHPA consists of
 - 4 cultural resource surveys submitted by the Permittee, 2 of the surveys recount a long history of Apache presence in the area
 - Documentation of consultation with the State Historic Preservation Office: The SHPO concurred with EPA’s finding that no historic properties would be affected by stamping EPA’s letter “approved”.
 - EPA’s response to comments explaining that it “was satisfied that further investigation of cultural resources as not necessary” to comply with NHPA based on its review of the cultural resources surveys and the fact that the project “is not on Native American land” and “the closest Indian Tribal lands to the project area are approximately 60 miles away.”
- NHPA implementing regulations:
 - Consultation on historic properties of significance to Indian tribes not on Indian Lands “requires the agency official to consult with any Indian tribe ... that attaches religious and cultural significance to historic properties that may be affected by an undertaking. **This requirement applies regardless of the location of the historic property**” (36 CFR § 800.2(c)(2)(ii)) (emphasis added).
 - “The agency official shall ensure that consultation in the section 106 process provides the Indian tribe [] a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes [] that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.” 36 CFR § 800.2(c)(2)(ii)(A).

Leslie Darman
 US Environmental Protection Agency
 Office of General Counsel, Water Law Office

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darman.leslie@epa.gov

From: Wehling, Carrie

Sent: Thursday, May 23, 2019 12:30 PM

To: Rivera, Nina <Rivera.Nina@epa.gov>; Darman, Leslie <Darman.Leslie@epa.gov>

Subject: RE: Monthly SDWA legal issues call

Yes. Lucita Chin, R8

Caroline (Carrie) Wehling

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From: Rivera, Nina

Sent: Thursday, May 23, 2019 12:29 PM

To: Wehling, Carrie <Wehling.Carrie@epa.gov>; Darman, Leslie <Darman.Leslie@epa.gov>

Subject: RE: Monthly SDWA legal issues call

Did you catch the name of the woman who said that they have a regional attorney who has done a lot of NHPA work and worked with her on UIC issues? Thanks.

-----Original Appointment-----

From: Wehling, Carrie

Sent: Sunday, January 28, 2018 3:16 PM

To: Wehling, Carrie; Allenbach, Becky; Alvarado, Tina; Sallach, Andrew; Bahk, Benjamin; Baron, Adam; Bates, William; Bearley, Mia; Bellovary, Chris; Bergman, Ronald; Biggs, Tonia; Binder, Jonathan; Bolender, Mark; Brainich, Kathelene; Brignoni, Rosa; Bufill, Lourdes; Bush, William; Busterud, Gretchen; Campbell, Rich; Steiner-Riley, Cara; Chin, Lucita; Clark, Jacqueline; Cobb, Wilda; Curley, Michael; Dain, Gregory; Darman, Leslie; Deltoral, Miguel; Denton, Loren; Downing, Jane; Duross, Jeanne; Elkins, Timothy; Engelman, Alexa; Eppers, Jim; Evans-Walker, Daria; Feinmark, Phyllis; Fergusson, Bruce; Ford, Peter; Frankenthaler, Douglas; Gambatese, Jason; Garcia, Jefferie; Steinbauer, Gary; Gillespie, David; Glazer, Thomas; Glowacki, Joanna; Gonzalez, Maria; Griffo, Shannon; Hagler, Tom; Hall, Chelo; Handler, Neil; Harmon, Kenneth; Harris, Jamie S.; Hartman, Bob; Hayden, Melva; Henson, Tucker; Herbert, Rusty; HO, KARLY; Hollimon, Shelia; Huffman, Diane; Jamieson, Cheryl; Jones, Fran; Kahn, Lisa; King, Carol; Klassman, Debra; Kobelski, Bruce; Kraft, Nicole; Kramer, Kim; Kuefler, Janet; Lazos, Pamela; Lensink, Andy; Li, Corine; Lieben, Ivan; Livingston, Peggy; MacDonald, Jennifer; Magnuson, Janet; Makepeace, Caroline; Mastro, Donna; Matsumoto, Kimi; McAuliffe, Mary; McDonald, Jeffrey; McGuire, Karen; McKenna, Douglas; Messier, Dawn; Mindrup, Mary; Minter, Douglas; Moffatt, Brett; Moriarty, Edward; Murdock, Russell; O'Lone, Dan; Parikh, Pooja; Parker, Jennifer; Poy, Thomas; Pringle, Everett; Rice, Cassandra; Rivera, Nina; Rogers, Harold; Rota, Ken; Roy, Stephen; Ryan, Kevin; Saporita, Chris; Shoven, Heather; Snyder, Gina; Speir, Jeffrey; St-Denis, Francine; Stein, Mark; Stillman, Sarah; Stopper, Nathan; Swenson, Erik; Taheri, Mehdi; Teschner, Sarah; Thurmon, Clarke; Uhl, Lisa; Urchel, Raymond; Wagner, Michael; Winiecki, Eric; Yeany, Philip; Zenick, Elliott; Zia, Humane; Deason, Ken; Denawa, Mai; Gutierrez, Barbara; Holmes, Carol; Muehlberger, Christopher; Przyborski, Jay; Smith, Robert H; Dubey, Susmita

Cc: Yocom, Danita; Mancusi-Ungaro, Philip; Johnson, Patrick; Shamet, Stefania; Baptista, Chrisna; Viveiros, Edward; Ellenbogen, Victoria; Rog, Morgan; Wilson, Dane; O'Meara, Nidhi; Tierney, Meghan; Armor, Suzanne; Wells, Kimberly; Lopez-Carbo, Maria; Pierce, Jennifer; Bragan, Mary Jo

Subject: Monthly SDWA legal issues call

When: Thursday, May 23, 2019 12:00 PM-1:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: OGC-WLO-O365-ConferenceLine_1-202-991-0477_Id5442824

Agenda:

PWS issues:

1. Update on perchlorate proposal (Messier, OGC)
2. Update on lead rules (Darman, OGC)

UIC issues:

1. Arroyo Grande aquifer exemption decision (attached) and summary of regional information re ESA consideration (Darman, OGC)
2. EAB action on UIC permit appeals raising EJ issues (Parikh, OGC)

And....any other issues folks would like to raise...

Thanks.

Carrie